

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

Dist.
PL-II

31578

B-216306.2

FILE:

DATE: June 28, 1985

Harry Kahn Associates, Inc.

MATTER OF:

DIGEST:

1. Protest that alleged conflict of interest by agency procurement personnel tainted the evaluation of proposals is denied where it is based only on conjecture and speculation.
2. Protest that the contracting agency held discussions with the eventual awardee after best and final offers, leading to a downward adjustment of the awardee's cost, is dismissed as untimely, since it was not filed within 10 working days after the protester knew or should have known of the protested actions.
3. GAO will not review an untimely protest under the significant issue exception to GAO's timeliness rules where the protest does not present a matter of widespread interest or importance to the procurement community that has not been considered on the merits in previous decisions.

Harry Kahn Associates, Inc. (Kahn), protests the Department of the Navy's award of a cost-plus-fixed-fee contract for technical services and related materials to update Naval Air Systems Command Technical Manuals to JANA, Inc., under request for proposals (RFP) No. N00140-83-R-0364. Kahn alleges that the Navy failed to conduct a fair evaluation of proposals, asserting the existence of a conflict of interest and unfair discussions with the awardee.

The protest is denied in part and dismissed in part.

The solicitation was issued on April 29, 1983, and provided for award by lot, with each of four geographic regions representing a lot. Proposals were evaluated with regard to the following factors: corporate past experience,

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personnel, resources, management plan, contractor facilities, cost and cost realism. Out of 11 offerors, only Kahn and JANA were considered to be within the competitive range. Both firms were advised of deficiencies in their proposals and were requested to submit best and final offers by June 22, 1984.

After a technical evaluation of best and final offers, Kahn and JANA were determined to be equal with regard to technical quality. The contract negotiator, with the assistance of the Defense Contract Audit Agency (DCAA) and the Naval Regional Contracting Center (NRCC), then examined and evaluated the cost proposals for realism, finding both to be reasonable and fully realistic as submitted. However, JANA's proposal contained errors in the calculation of labor and overhead rates. The contract negotiator determined that it was clear from the cost proposal what the true figures should be, and made the necessary corrections to JANA's proposal.

JANA confirmed the existence of these errors to the Navy and, in July and August of 1984, submitted corrections, which included recalculations of its fixed fee percentage. This revision in the fixed fee was treated as a late proposal revision and not considered in the evaluation. On September 4, Kahn was advised that a contract for all four lots would be awarded to JANA as the offeror with the lowest realistic cost to the government.

On December 6, a debriefing was held with Kahn during which JANA's mistakes, and the corrective action applied to them, were discussed. In early February of 1985, Kahn filed suit against the Navy in the United States District Court for the Eastern District of Virginia seeking, inter alia, a request for a decision by our Office and a preliminary injunction to prevent JANA from fulfilling the contract. The court denied this request, and in early April of 1985 Kahn notified us that it had voluntarily dismissed its suit against the Navy without prejudice and requested that we continue processing the protest.

Kahn alleges that the award to JANA is tainted by a conflict of interest because prior to the award of the contract two current employees of JANA held important positions with the Navy relating to the prior contract for the services and the procurement now in issue. Kahn suggests that these employees must have used their positions to assure JANA's success over Kahn.

Our review of Kahn's contentions concerning conflicts of interest is limited to determining whether the individuals involved improperly exerted prejudice or bias on behalf of the awardee. See Lightning Location and Protection, Inc., B-215480, Feb. 21, 1985, 85-1 C.P.D. ¶ 216. Moreover, the protester has the burden to prove its case, and unsupported allegations or assertions of the potential for impropriety do not satisfy this burden. Id.

The only substantive evidence submitted by Kahn on this issue is two affidavits, one from a Kahn employee and one from an employee at the Naval Air Rework Facility. In these affidavits, it is asserted that one of the two current JANA employees was hired as the contracting officer's technical representative (COTR) with the assistance of the other employee, the former COTR, who left to work for JANA. One affiant, a Kahn employee, states that the COTR improperly rated Kahn as marginal and immediately afterwards began negotiating with JANA for employment, ultimately securing a position. The other affiant claims that the COTR frequently contacted JANA through the former COTR. In response, the Navy asserts that several of its employees were called upon to rate Kahn; that the NRCC released the contents of cost proposals only to the DCAA; that no statute was violated by the individuals in question; and the mere fact that these former employees are now employed by JANA in itself establishes no impropriety.

We deny the protest on this issue. Kahn simply has failed to show that these employees assisted JANA in the award of this contract or arranged for their subsequent employment in exchange for any acts or omissions on their part. The only bridge that exists between Kahn's allegation and a real conflict of interest is one of conjecture or supposition based on the affidavits. We will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Lightning Location and Protection, Inc., B-215480, supra.

Kahn's second argument concerns what it refers to as "discussions" between the Navy and JANA. Kahn asserts that it was unfair for the Navy to discuss the cost realism evaluation with JANA after best and final offers were submitted without affording Kahn the opportunity to enter into further discussions. Kahn argues that this contact between the Navy and JANA allowed JANA to revise direct labor and overhead rates, which resulted in the displacement of Kahn's

low offer. The Navy argues that JANA's errors were "obvious clerical or arithmetic errors" requiring no clarification by JANA, although the contract negotiator admittedly did notify JANA by phone that the errors had been discovered.

Under our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(2) (1984), a protest based on other than solicitation improprieties must be filed no later than 10 working days after the basis for the protest is known or should have been known, whichever is earlier. Kahn raised this issue for the first time in a submission received in our Office on December 28, 1984. The basis for this protest issue, however, was known or should have been known on December 6, the day of the debriefing, when the Navy presented an explanation of the cost realism evaluation which included a discussion of JANA's arithmetic errors.

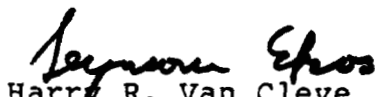
We recognize that in its February 26, 1985, response to the agency report Kahn alleges that the contracting officer at the debriefing concealed facts on the matter that were disclosed only upon receipt of data under the Freedom of Information Act (FOIA) on December 17, and "did not go into any detail" concerning the obvious errors in JANA's proposal. The Navy, however, asserts that "all relevant materials were discussed with [Kahn] at the 6 December 1984 debriefing." It claims that the contract negotiator presented "an exhaustive and thorough explanation of the cost realism evaluation performed," as well as a "detailed discussion of arithmetic errors." Moreover, in two submissions to our Office, dated December 27, 1984, and January 8, 1985, Kahn included affidavits from its Vice President and Accountant in which they state that they were informed of JANA's errors, the Navy's adjustments, and the agency's conversation with JANA. Both affiants were given specific downward calculations for JANA's lots I and IV. Hence, Kahn clearly knew the basis for protest at the debriefing.

Kahn urges that we consider this protest issue under the significant issue exception to our timeliness rules, 4 C.F.R. § 21.2(c), should we doubt its timeliness. We will review an untimely protest under this exception, however, only where it involves a matter of widespread interest or importance to the procurement community that has not been considered on the merits in a previous decision. McCabe, Hamilton and Renny Co., Ltd., B-217021, Mar. 15, 1985, 85-1 C.P.D. ¶ 312. The exception is constructed strictly and

used sparingly to prevent our timeliness rules from being rendered meaningless. Id. Since we have considered the protest issue of what sorts of agency-offeror contact constitute discussions on numerous occasions in the past, we will not invoke the exception here. See, e.g., Weinschel Engineering Co., Inc., B-217202, May 21, 1985, 64 Comp. Gen. ___, 85-1 C.P.D. ¶ __; Technical Services Corp., B-214634, Feb. 7, 1985, 64 Comp. Gen. ___, 85-1 C.P.D. ¶ 152; Mayden & Mayden, B-213872.3, Mar. 11, 1985, 85-1 C.P.D. ¶ 290.

In any event, our review of the record shows that JANA's errors, and the intended prices, were obvious to the Navy and needed no explanation from the offeror; JANA's post-closing communication simply confirmed the Navy's determinations; and the Navy specifically rejected any attempt by JANA to revise its offer along with the confirmation. Discussions with one offeror, thereby necessitating discussions with other offerors, occur where the offeror is afforded an opportunity to revise or modify its proposal or when the information requested and provided is essential for determining the acceptability of the offer. Technical Services Corp., B-214634, supra. Confirmation of the agency's discovery of an obvious mistake, and the corrective action applied thereto, generally do not rise to either level.

The protest is denied in part and dismissed in part.

for 
Harry R. Van Cleve
General Counsel